BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

RECEIVED

FEB 17 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

DOCKET FILE COPY ORIGINAL

In the Matter of	)	
	)	
Amendment of Part 1 of the	)	
Commission's Rules --	)	WT Docket No. 97-82
Competitive Bidding Procedures	)	
	)	

To: The Commission

PETITION FOR PARTIAL RECONSIDERATION OF THE THIRD REPORT AND ORDER

Houston 936 SMR, Inc. ("*Houston 936*"), by its attorneys, hereby seeks partial reconsideration of the Third Report and Order, FCC 97-413, released December 31, 1997 ("*Third R&O*"), in the above-captioned proceeding. Houston 936 seeks reconsideration of the Third R&O to the extent that it attempts to change licensees' obligations under existing promissory notes and security agreements. In particular, Houston 936 challenges the fairness and legality of the Commission's attempt to eliminate the 90-day non-delinquency period contained in existing promissory notes and security agreements executed by 900 MHZ SMR licensees.

Houston 936 currently holds six 900 MHZ SMR licenses. Houston's 936's predecessor, Cordell Engineering, Inc. ("*CEI*"), signed a promissory note and security agreement for each of these SMR licenses. Houston 936 thus has a significant interest in changes to rules governing installment payment obligations for these 900 MHZ SMR licenses.

105157/

In the Third R&O, the Commission attempted to unilaterally rewrite (through rule changes) existing executed promissory notes and security agreements to provide that licensees who make late payments (*i.e.* even one day after payment is due) will be subject to an automatic 5% late payment penalty added to the amount of the installment. Under these rules, if no payment is received by the end of the 90th day after the due date, the late payment penalty will be increased by 10%, to a total penalty of 15%. If no payment is received by the end of the 180th day after the due date, the licensee is in default and subject to automatic cancellation of its license pursuant to Section 1.2104(g)(2) of the Commission's rules. In addition, failure to pay a required late fee when due will also cause the license to be declared in default.

As a matter of fundamental fairness, the Commission cannot unilaterally change the terms of existing promissory notes and security agreements. Licensees who obtained their licenses under rules which permitted a licensee to make a payment any time within 90 days of the due date without penalty should be entitled to rely upon those rules and have them apply for the full duration of the installment payment period. Houston 936's predecessor, CEI, bid in the 900 MHZ SMR auction in reliance upon the then-existing installment payment rules which provided that the licensee would be in default only if it was more than ninety (90) days delinquent in any payment.[1] Upon successful completion of the 900 MHZ SMR auction, CEI entered into promissory notes and security agreements that set forth a payment schedule and obligations for each of its SMR licenses. These notes and security agreements did not provide for any default or

---

1 See 47 C.F.R. § 1.2110(e)(4)(i).

penalty for late payment if payment was made within 90 days of the due date. Houston 936 and CEI repeatedly have been advised through informal telephone conversations with FCC staff that pursuant to the terms of their promissory notes and security agreements, payments made within the 90 day grace period were not to be considered late and such licenses would not be subject to revocation or cancellation until that period had expired with no payment being made. In addition, on March 26, 1997, the Commission issued a public notice clarifying that licensees such as Houston 936 paying on an installment basis are entitled to a 90-day grace period. A copy of this public notice is attached hereto.

Not only is the Commission's attempt to unilaterally change the terms of promissory notes and security agreements unfair, it is also an attempt to unlawfully apply rule changes retroactively to pre-existing promissory notes and security agreements already entered into by licensees, such as Houston 936, with the United States government. See, e.g. Chadmoore Communications, Inc. v. FCC, 113 F.3d 235, 240 (D.C. Cir 1997), citing Georgetown University Hospital v. Bowen, 821 F.2d 750, 757 (D.C. Cir. 1987), aff'd on other grounds, 488 U.S. 204 (1988) ("The Administrative Procedures Act requires that legislative rules (i.e. rules adopted pursuant to the notice and comments procedures of the APA, 5 U.S.C. 553) be given future effect only. [Therefore], equitable considerations are irrelevant to the determination of whether the [agency's] rule may be applied retroactively; such retroactive application is foreclosed by the express terms of the APA.")

Retroactive imposition of these changes to the installment payment provisions on licensees such as Houston 936, who have already won licenses and signed promissory notes and security agreements, places a substantial unexpected burden upon such licensees, many of whom have financing arrangements in place which did not take into account the possibility of late payment penalties. In addition, instead of adding certainty to the installment payment process as suggested by the Commission in the Third R&O,[2] the retroactive imposition of these late payments to existing licensees who are currently paying their licenses in installments will only serve to create further reluctance on the part of investors whose financing is needed to complete, and in some case even begin, construction and operation of the systems in question. Indeed, the rule changes set forth in the Third R&O, rather than helping licensees pursue private market solutions to financing difficulties as intended by the Commission, may have the unintended effect of eliminating such private market solutions as banks and other traditional credit facilities become increasingly wary of lending additional funds to current or future licensees whose licenses are subject to promissory notes and security agreements with terms that may be unilaterally changed at the whim of the Commission.

Accordingly, the Commission should reconsider its decision in the Third R&O and apply its rules changes relating to installment payment plan grace periods and late payment fees prospectively only.

---

[2] Third R&O at ¶ 106.

Respectfully submitted,

HOUSTON 936 SMR, INC.

By: Linda D. Feldmann

Meredith S. Senter, Jr.
Linda D. Feldmann

Leventhal, Senter & Lerman PLLC
2000 K Street, N.W.
Suite 600
Washington, DC 20006-1809

February 17, 1998

Its Attorneys

105157/

Attachment

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET, N.W.
WASHINGTON, D.C. 20554

News Media Information: (202) 418-0500
Fax-On-Demand: (202) 418-2830
Internet: http://www.fcc.gov
ftp.fcc.gov

DA 97-580
March 25, 1997

REMINDER TO LICENSES WITH INSTALLMENT PAYMENT PLANS: AVAILABILITY OF GRACE PERIODS

The Wireless Telecommunications Bureau ("Bureau") has received recent inquiries seeking clarification of the operation of the Commission's grace period rules and this Public Notice also responds to those inquiries. This Public Notice serves as a reminder to licensees using the FCC's installment payment program that the Commission's rules provide for "grace periods" regarding delinquent installment payments.

Under 47 C.F.R. § 1.2110(e)(4), auctionable licenses for which licensees are paying through installment plans are granted "conditioned upon the full and timely performance of the licensee's payment obligations under the installment payment plan." Each of these licensees was provided with a payment schedule from the Office of the Managing Director or the Treasury Department with a schedule of specific payment due dates. For example, according to the payment schedules issued in conjunction with IVDS licenses, an installment payment is due on March 31, 1997.

Under the Commission's rules at 47 C.F.R. § 1.2110(e)(4)(i), "[i]f an eligible entity making installment payments is more than ninety (90) days delinquent in any payment, it shall be in default." In other words, the Commission's rules provide that a licensee making installment payments is not deemed to be in default until it is more than ninety days delinquent in making a payment to the government ("ninety-day non-default period").

Furthermore, 47 C.F.R. § 1.2110(e)(4)(ii) states that:

> Upon default or in anticipation of default of one or more installment payments, a licensee may request that the Commission permit a three to six month grace period, during which no installment payments need be made. In considering whether to grant a request for a grace period, the Commission may consider, among other things, the licensee's payment history, including whether the licensee has defaulted before, how far into the license term the default occurs, the reasons for default, whether the licensee has met construction build-out requirements, the licensee's financial condition, and whether the licensee is seeking a buyer under an authorized

602925

distress s__policy. If the Commission grants a request for a grace period, or otherwise approves a restructured payment schedule, interest will continue to accrue and will be amortized over the remaining term of the license.

This rule effectively provides licensees who cannot make their regularly scheduled payment within ninety (90) days of the payment due date with an opportunity to request additional time to make the payment. To request a "grace period", licensees must submit a written request to the Commission setting forth the basis for the request and addressing applicable considerations as outlined in the rule set forth above.

Accordingly, under the Commission's rules, licensees who have a payment due date of March 31, 1997 and make such payment on or before Monday, June 30, 1997 (the last day of the ninety-day non-default period) will not be deemed to be in default. Further, licensees who do not make their March 31, 1997 payment by June 30, 1997 will not be deemed to be in default provided they file a grace period request on or before June 30, 1997.

Licensees interested in filing grace period requests should send them to: Federal Communications Commission, Wireless Telecommunications Bureau, Auctions Division, 2025 M Street, Room 5322, Washington, D.C. 20554, Attention: A. Jerome Fowlkes.

- FCC -

602926